
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

KARL LOSEE, v. SGT. PREECE et al.,	Plaintiff, Defendants.	MEMORANDUM DECISION & ORDER GRANTING MOTION TO DISMISS & TO CURE DEFICIENT COMPLAINT Case No. 2:18-CV-195-TC District Judge Tena Campbell
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Plaintiff, inmate Karl Losee, filed this *pro se* civil rights suit, *see* 42 U.S.C.S. § 1983 (2019). The Court now grants Defendants' Motion to Dismiss, (Doc. No. 11), and orders Plaintiff to file an amended complaint to cure deficiencies before further pursuing claims.

COMPLAINT'S DEFICIENCIES

Complaint:

- (a) does not affirmatively link Defendants to civil-rights violations.
- (b) appears to inappropriately allege civil-rights violations on a respondeat-superior theory.
- (c) improperly alleges a Ninth Amendment violation. *Parnisi v. Colo. State Hosp.*, No. 92-1993, 1993 U.S. App. LEXIS 9128, at *5 (10th Cir. April 15, 1993) (“Although the Ninth Amendment may restrict the activities of state actors, it has never been applied to prevent the denial of medical treatment to prisoners. Indeed, such an application would be inappropriate, since the Ninth Amendment protects only those rights not otherwise ‘enumerat[ed] in the Constitution,’ and the Eighth Amendment specifically addresses itself to the mistreatment of prisoners.”) (citations omitted)).
- (d) has claims appearing to be based on conditions of confinement; however, the complaint was apparently not submitted using the legal help Plaintiff is entitled to by his institution under the Constitution. *See Lewis v. Casey*, 518 U.S. 343, 356 (1996) (requiring prisoners be given “adequate law libraries or adequate assistance from persons trained in the law’ . . . to ensure that inmates . . . have a reasonably adequate opportunity to file nonfrivolous legal claims challenging

their convictions or conditions of confinement") (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (emphasis added)).

GUIDANCE FOR PLAINTIFF

Rule 8 of the Federal Rules of Civil Procedure requires a complaint to contain "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Rule 8's requirements mean to guarantee "that defendants enjoy fair notice of what the claims against them are and the grounds upon which they rest." *TV Commc'ns Network, Inc. v ESPN, Inc.*, 767 F. Supp. 1062, 1069 (D. Colo. 1991).

Pro se litigants are not excused from complying with these minimal pleading demands. "This is so because a pro se plaintiff requires no special legal training to recount the facts surrounding his alleged injury, and he must provide such facts if the court is to determine whether he makes out a claim on which relief can be granted." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Moreover, it is improper for the Court "to assume the role of advocate for a pro se litigant." *Id.* Thus, the Court cannot "supply additional facts, [or] construct a legal theory for plaintiff that assumes facts that have not been pleaded." *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989).

Plaintiff should consider the following points before refiling Plaintiff's complaint. First, the revised complaint must stand entirely on its own and shall not refer to, or incorporate by reference, any portion of the original complaint. *See Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998) (stating amended complaint supersedes original).

Second, the complaint must clearly state what each defendant--typically, a named government employee--did to violate Plaintiff's civil rights. *See Bennett v. Passic*, 545 F.2d

1260, 1262-63 (10th Cir. 1976) (stating personal participation of each named defendant is essential allegation in civil-rights action). "To state a claim, a complaint must 'make clear exactly who is alleged to have done what to whom.'" *Stone v. Albert*, No. 08-2222, slip op. at 4 (10th Cir. July 20, 2009) (unpublished) (emphasis in original) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008)).

Third, Plaintiff cannot name an individual as a defendant based solely on his or her supervisory position. *See Mitchell v. Maynard*, 80 F.2d 1433, 1441 (10th Cir. 1996) (stating supervisory status alone does not support § 1983 liability).

Fourth, "denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983." *Gallagher v. Shelton*, No. 09-3113, 2009 U.S. App. LEXIS 25787, at *11 (10th Cir. Nov. 24, 2009).

MOTION FOR APPOINTED COUNSEL

The Court now addresses Plaintiff's motion for the Court to ask *pro bono* counsel to represent him. Plaintiff has no constitutional right to counsel. *See Carper v. Deland*, 54 F.3d 613, 616 (10th Cir. 1995); *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987). However, the Court may in its discretion appoint counsel for indigent plaintiffs. *See* 28 U.S.C.S. § 1915(e)(1) (2019); *Carper*, 54 F.3d at 617; *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). Plaintiff bears the burden of convincing the Court that his claim has enough merit to warrant appointment of counsel. *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985).

In deciding whether to appoint counsel, this Court considers a variety of factors, like "the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's

ability to present his claims, and the complexity of the legal issues raised by the claims." *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (quoting *Williams*, 926 F.2d at 996); *accord McCarthy*, 753 F.2d at 838-39. Considering the above factors, the Court concludes here that, at this time, Plaintiff's claims may not be colorable, the issues in this case are not complex, and Plaintiff is not at this time too incapacitated or unable to adequately function in pursuing this matter. Thus, the Court denies for now Plaintiff's motion for appointed counsel.

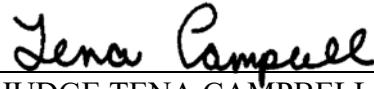
ORDER

IT IS HEREBY ORDERED that:

- (1) Defendants' Motion to Dismiss the Complaint is **GRANTED**. (Doc. No. 11.)
- (2) Plaintiff must within thirty days cure the Complaint's deficiencies noted above.
- (3) The Clerk's Office shall mail Plaintiff the Pro Se Litigant Guide with a form habeas petition for Plaintiff to use should Plaintiff choose to file an amended petition.
- (4) If Plaintiff fails to timely cure the above deficiencies according to this Order's instructions, this action will be dismissed without further notice.
- (5) Plaintiff's motion for appointed counsel is **DENIED**, (*see* Doc. No. 2); however, if, after the case develops further, it appears that counsel may be needed or of specific help, the Court will ask an attorney to appear pro bono on Plaintiff's behalf.

DATED this 11th day of March, 2019.

BY THE COURT:



JUDGE TENIA CAMPBELL
United States District Court